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Case Western Reserve Law Review

Volume 24 | Issue 4

1973

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Case Western Reserve University Law Review

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Recommended Citation

Case Western Reserve University Law Review, *Measure of Damages Due the Lost-Volume Seller under UCC Section 2-708(2): Two Points of View: Introduction*, 24 Case W. Res. L. Rev. 684 (1973)

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COMMENTS

The Measure of Damages Due the Lost-Volume Seller Under UCC Section 2-708(2): Two Points of View

Introduction

What follows are two Comments on a question of statutory construction that has provoked considerable discussion among commercial law commentators: the proper application of subsection 2-708 (2) of the Uniform Commercial Code (UCC) to the lost-volume seller. The gist of the problem is that if a seller of goods has an unlimited capacity to supply those goods at a particular price but has only a finite number of potential buyers, then a breach of contract by one of these buyers results in depriving the seller of a sale that he cannot possibly replace. As a result, the seller ends up losing the unit profit he would have earned on the sale.

The common law's response to this problem was to give the seller damages in the amount of this lost profit. According to Professor Corbin, this solution was a logical corollary to the mitigation-of-damages rule. Since upon the buyer's repudiation the seller can normally resell the goods or make some other use of them, the standard measure of damages is the contract price reduced by the price obtainable in the resale. But in the lost-volume cases, the resale is a sale that would have been made even if the buyer had not repudiated. Consequently, the seller in this situation need not give the buyer credit for the entire resale proceeds. He is entitled to deduct only the cost of procurement and keep the profits he would have earned had the buyer performed.¹

Against this common law background UCC section 2-708(2) was drafted. To the extent that the literal wording of the section departs from the common law rule by requiring that all sellers give to their breaching buyers "due credit for payment or proceeds of resale," commentators have stated that the draftsmen of the section

¹ 5 A. CORBIN, CONTRACTS § 1039, at 246-47 (1964).

committed a "gross error."² They argue that the statute's "due credit" language must be ignored if a proper result is to be reached. Mr. Schlosser, in his Comment, suggests that this drastic step need not be taken. As a solution to the commentators' criticisms, he proposes an interpretation of section 2-708(2) which would produce the result achieved at common law yet at the same time give full force to the language of the statute.

Upon receiving Mr. Schlosser's Comment, the editors of the *Review* approached Professor Shanker for his views on the question. In his class in Sales, Professor Shanker had suggested that a literal reading of section 2-708(2), which seems to deny the seller recovery of his lost profit on the breached sale, might make more commercial sense. Professor Shanker accepted the *Review's* invitation to put his views on the matter in writing. His Comment presents several persuasive reasons why the Code draftsmen might have wished to alter the common law rule relating to lost-volume sellers and give the breaching buyer full credit for the resale proceeds in every instance.

Following the two Comments is a postscript prepared by the editors which discusses the economic theory that could be applied in analyzing the plight of the lost-volume seller. The postscript is not presented as another set of legal arguments to refute and be refuted by the two preceding Comments. Rather it is intended to operate as an alternative point of origin for dealing with the problems that lie at the heart of the lost-volume phenomenon. Admittedly the discussion is theoretical. But the arguments made by Mr. Schlosser and Professor Shanker, as well as those of the other commentators, all rest ultimately on some sort of abstraction of how the market faced by the seller functions. Given that some element of theorizing is apparently necessary, a model geared to accepted economic principles would seem the most appropriate basis for formulating the legal rules.

² J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 7-13, at 235 (1972).